**WORKERS' COMPENSATION ADVISORY COUNCIL**

**MINUTES ~~ APRIL 9, 1999 MEETING [1:00 P.M.]**
**710 JAMES ROBERTSON PARKWAY**
**HEARING ROOM, FIRST FLOOR**
**ANDREW JOHNSON TOWER**
**NASHVILLE, TENNESSEE**

The meeting was called to order by Mr. Dale Sims.

Voting members in attendance:
Mr. Jack Gatlin
Mr. James G. Neeley
Mr. Bob Pitts
Mr. Othal Smith, Jr.
Mr. Steve Turner [by proxy to Mr. Pitts]
Mr. Carter Witt [by proxy to Mr. Pitts]

Nonvoting members in attendance:
Ms. Jacqueline B. Dixon
Mr. Tony Farmer.
Ms. Abbie Hudgens [by telephone conference call]

Ex officio members in attendance:
Ms. Sue Ann Head, Assistant Commissioner of Labor
[designee for Commissioner Michael E. Magill]
Commissioner Doug Sizemore, Department of Commerce & Insurance

Also present:
M. Linda Hughes, Executive Director

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The minutes of the March 19, 1999, Workers' Compensation Advisory Council meeting were unanimously approved.

[Please note: In the following, "Mr. Farmer" refers to Mr. Jim Farmer and "Mr. T. Farmer" refers to Mr. Tony Farmer.]

NEW BUSINESS

A. DEPARTMENT OF LABOR REPORT RE: SETTLEMENT APPROVAL PROCESS

Ms. Sue Ann Head, Assistant Commissioner of the Department of Labor was recognized. She introduced Mr. Jim Farmer, Director of the Division of Workers' Compensation, who presented a summary of the written report concerning the Department of Labor's settlement approval process. The written report was a result of a survey conducted by the Department of the settled claims which had been approved by the Commissioner of Labor or his designee. The report had been requested by the Advisory Council.

Mr. Farmer first reviewed the provisions of the law which gave the Commissioner of Labor or his designee the authority to approve settlements and established the requirements for any settlement approved through this process. Mr. Farmer noted although the law does not specify who shall be the Commissioner's designee, the Department has established the internal policy that this shall be a workers' compensation specialist. As there were no specific guidelines for the approval process established by statute, the Department has tried to mirror, to the extent possible, the manner by which the courts approve workers' compensation settlements.

Mr. Farmer then explained the documents required to be presented to the Department when a settlement approval is requested. The documents will vary depending on whether or not the approval request follows a mediated settlement through the benefit review process. Although the statute requires a different specialist to approve a settlement reached as a result of a benefit review conference only in those cases in which the employee is unrepresented by counsel, the Department has adopted the policy that all settlements are reviewed for approval by a specialist not associated with the claim whether or not the employee is represented. The exact procedures and guidelines for the approval process were contained in the written report.

The Advisory Council had requested the names and qualifications of the Department employees who approve settlement agreements. The information was included in the written report. Mr. Farmer did note one-third of this group are Rule 31 certified mediators and that by the end of the fiscal year all workers' compensation specialists will be Rule 31 certified. Nine of the specialists are licensed attorneys and four other specialists have law degrees. [Although not related directly to the settlement approval process, Mr. Farmer stated through December, 1998, the workers' compensation specialists had conducted 6, 085 benefit review conferences.]

In calendar year 1997, 22 settled claims were presented to the Department of Labor for approval. [The statute did not go into effect until July 1, 1997 and applied only to injuries occurring after January 1, 1997.] In 1998, the Department approved 433 settlements. Judicial Districts 1, 20 and 30 had the most cases presented to the Department for approval. Mr. Farmer reported that a benefit review conference was conducted in 70% of the cases in which the settlement agreement was approved by the Department of Labor in 1997 and 1998. Future medical expenses were left open

for life, or for a specified period of time, in 58% of those cases. In 69% of the settlements approved, the employee was represented by an attorney; in 74% the employer was represented; in 57% both employee and employer were represented and in 15% of the cases neither the employee nor the employer was represented.

The information presented concerning future medical expenses, both in the written report and orally by Mr. Farmer, generated considerable discussion among the members of the Advisory Council. Mr. Neeley expressed concern about those cases in which the Department approved a settlement in which the employee's medical benefits were left open for a specific period less than life and asked Mr. Farmer to explain the Department's criteria which would give the Department the expertise to determine the approval of a specific case needs three years of open medical treatment. Mr. Farmer replied that the criteria used by the Department is the agreement of the parties as the future medical expense has been used by the parties as a negotiating item in the benefit review conference and in the approval proposal. The normal situation is that the employee will agree to close the future medicals at the time of settlement or after a time period in return for a specific monetary award.

Mr. Farmer also reported he had calculated that in those cases in which the employee was represented by an attorney, future medical expenses were closed 51.4% of the time. When the employee was not represented by counsel, future medical expenses were closed in 41.5% of the cases. When both parties were represented, the future medical expenses were closed in 54% of the cases and when neither of the parties was represented by an attorney, the future medical expenses were closed in 31% of the cases. Mr. Farmer assured Mr. T. Farmer that he was not suggesting because an employee was represented by a lawyer, the specialist does not have a duty to determine all the same requirements he would have if the employee was not represented. Mr. T. Farmer noted, and Mr. Farmer agreed, the specialist has the requirement to determine the employee is receiving substantially all the benefits under the workers' compensation statute whether or not the employee is represented by counsel.

Mr. Farmer stated it is the Department's position that it does not have the authority to approve a settlement which does not provide to the employee substantially the benefits to which he is entitled even if the case is one in which compensability is contested. The basis for this position is subsection (b) of the law [TCA 50-6-206] which refers to a court being able to approve a settlement without regard to whether the settlement provides substantially the benefits to which they are entitled.

Mr. Farmer stated specialists have refused to approve a proposed settlement in less than 4-5 cases. This information is not included in the written report. Mr. Farmer inquired whether the Department has the right to substitute its judgment and reject a proposed settlement of a case in which an employee is represented by an attorney, the employee understands the agreement, it is the desire of the employee that the agreement be approved, the employee is competent to enter into an agreement, the employee understands the agreement and the agreement provides the employee with

substantially the benefits to which he is entitled. Mr. T. Farmer asked whether this is what a judge does and Mr. Farmer agreed. In response to Mr. T. Farmer's question whether Mr. Farmer was suggesting the Department does not have the same responsibility, Mr. Farmer stated he was posing this as a philosophical question. Mr. Farmer indicated it was his experience that the specialists' examination of the employee prior to approval of a settlement is usually more extensive than the examinations by the judges. Mr. Smith noted this depends on the specific judge.

Mr. Neeley stated he felt the Department has a responsibility, irregardless of what the attorney or the employee says, to disapprove a settlement of the future medical aspects of a claim if in the experience of the department [which has more information and knowledge of medical conditions than any other entity in the state] it should not be closed. Mr. Neeley reported he has heard stories, which he does not know are accurate or not, concerning settlements which a judge would not approve that the Department would approve. He questioned the approval of a case in which the medical expenses are left open on a medical basis for 10 years. [Mr. Smith noted the ten year time may be explained by the employee being 55 years of age.]

Mr. Farmer stated the Department does not make decisions as to what the employee's medical experience is going to be in the future. What the Department has done, is what he thinks the courts have done, and that is to make a judgment as to whether or not the employee understands what it is they are doing and that it meets the criteria the law establishes for the agreement. Mr. Farmer indicated there may have been times in which the Department has approved a settlement that a judge would not approve, but he is equally sure the Department has required more of the employee, employer and their representatives than the courts would have required.

Mr. Neeley expressed concern that the Department's criteria for approving a settlement does not include a review of the history of the injury to determine if it is one which will cause problems for a long period of time. Mr. Farmer noted the law establishes the criteria and questioned if the agreement meets the statutory criteria of providing substantially the benefits and the employee understands the agreement, whether the Department has the authority to reject the agreement. Mr. Neeley stated in his opinion the Department had the authority to reject a settlement agreement under the auspices that the employee is not receiving substantially the benefits under the law even if both the employee and the attorney has approved the agreement. The Department's authority to do this has never been challenged. Mr. Farmer noted the Department has disapproved settlements and the parties have gone to court and gotten the same settlement approved.

Mr. Neeley requested the Department to provide the history of each of the cases listed in the report as having medical expenses remaining open for three years or longer [to include the medical history and the name of the attorney]. Mr. Smith indicated some cases, such as a cut, scrape or break, will require no future medical expenses and he recognized that just because an employee has open medicals for life does not assure he will not have to fight to obtain the medical treatment. Mr. Farmer noted there are a lot of cases in which "buying out" the future medicals is to the employee's benefit, but the problem is that the Department does not know which cases these are. Mr. Smith

noted this process is a very subjective determination, for a judge or a specialist, as to whether the individual is receiving value out of a specific situation. Mr. Neeley expressed his opinion that if there is any doubt on the part of the Department then the agreement should not be approved.

Mr. Smith asked whether it would be more simple if the law provided that future medical expenses could not be closed. Mr. Farmer reminded everyone if the case goes to trial, then the medical always remain open. He agreed it would be more simple for the Department if the future medical expenses could not be closed ,but opined it would probably result in opposition from the insurance industry because they want to close the file.

Ms. Dixon inquired whether the Department has a uniform procedure for what the specialist is required to tell the employee regarding the future medical and whether the specialist is required to tell the employee if the case was tried the medicals would be open for the rest of his life. Mr. Farmer stated the specialist is required to tell the employee "Do you know that if your claim is tried before a judge and if the judge finds that you are entitled to workers' compensation benefits, your right to future medical treatment will be left open." Ms. Dixon stated she felt the employee should be told they would be entitled to medical benefits for the rest of their life. Mr. Farmer indicated he felt this was what the employee was told, but that this would be added to the checklist.

Mr. Farmer stated the new computer system can generate this type of report regularly. Mr. Sims suggested adding "nature of injury" to the report would allow the coordinator or supervising specialist to check to see if any trends related to future medical expenses were apparent and it would give more information by which to determine whether the judgment to close the medicals was a reasonable judgment to have been made. Mr. Farmer agreed considering the nature of the injury would give more information as to the potential for needed medical care, but suggested whether a court or the Department approves a settlement, a subjective judgment or decision is required.

Mr. Neeley stated he did not object to the fact that an employee is represented by an attorney being one factor, or that the employee understands the agreement being a factor in determining whether to approve a settlement. However, he stated he did not want those factors to be the conclusive factors. It was his feeling the Department has the obligation to be sure the employee receives reasonably everything he has coming to him.

Mr. Sims inquired as to what system the Department has in place to assure the Department's policies concerning settlement approvals are being followed and that a renegade specialist is not approving any settlement which is submitted. Mr. Farmer stated the process of review of approvals will be enhanced and an educational program will be developed for the specialists which will include the approval process and what does and does not constitute substantial benefits to the employee.

In answer to a question by Mr. Smith, Mr. Farmer stated he did not think the fact that legal fees in excess of $10,000 require approval by a judge has affected the number of approvals which have been submitted to the Department. Mr. Farmer also indicated he believes the Division of

Workers' Compensation has the responsibility, if the statistical data form is not complete, to notify the parties and do whatever has to be done to get the information. However, at present a lot of attorneys are simply reporting their fees are less than $10,000 and are not indicating the range of the fee. Mr. Farmer stated employee attorneys are supplying the fee amount and percentage. Although the Department is given the statutory responsibility to review attorney fees, Mr. Farmer questioned how a bill could be reviewed if the exact amount of the fees is not given, even though fees less than $10,000 are presumed reasonable.

The voting members of the Advisory Council agreed to Mr. T. Farmer's request that the settlement approval process issue remain on the active agenda for the next meeting and that the nonvoting members be allowed to submit any written comments they have since the Advisory Council had not had an opportunity to review the written report prior to the meeting.

B. CONSIDERATION OF PENDING LEGISLATION

The Advisory Council then discussed the following three bills on which action had been deferred at its March 19, 1999 meeting:

>SB485/HB1176 -- This bill amended TCA 50-6-241 to allow reconsideration whether or not loss of employment was related to the original injury and clarified that reconsideration is available for lump sum settlements and periodic payment awards. After discussion of the bill, the Advisory Council was equally divided and unable to reach consensus.

>SB530/HB748 -- This bill amended TCA 50-6-241 to allow reconsideration notwithstanding 50-6-230 and 50-6-231 and allowed reconsideration where the employee was no longer employed by the pre-injury employer for any reason except the voluntary resignation by the employee not based on the increase of incapacity due solely to the injury. After discussion of the bill, the Advisory Council was equally divided and unable to reach consensus.

>SB1510/HB755 -- This bill would alter the method by which the Special Workers' Compensation Appeals Panel would be selected. The Advisory Council noted some possible concerns about the bill as drafted. After consideration of the bill, the Advisory Council was equally divided and unable to reach consensus on the bill as drafted. The Advisory Council unanimously recommended if the bill went further that consideration be given to amending the bill by changing the words "persons" in the third sentence to "present or retired judges".

. The Advisory Council also considered the following two bills which had been amended after the March 19, 1999 meeting:

>SB200/HB1453 -- At the March 19 meeting the bill reviewed by the Advisory Council was a proposed amendment which contained felony provisions as well as a requirement the Department of Labor generate a report listing all employers who fail to obtain workers' compensation insurance or qualify as a self-insurer. Following that meeting, another amendment to the bill was introduced. The proposed amendment clarified some of the concerns of the Advisory Council by setting a specific date for the Department of Labor report and by providing the time period for which the report was to be given. Also, the felony penalties were deleted from the bill. After consideration, the Advisory Council voted unanimously to recommend the amendment, as presented, for passage as there was consensus the issue needed to be addressed.

Also discussed during the consideration of this amended bill, was the issue of how to ensure employees who are injured during periods when the employers have no workers' compensation coverage can obtain benefits. Mr. Neeley made a motion, seconded by Mr. Smith, that the bill be amended further to provide a procedure by which the injured employee would be assigned to a carrier in the assigned risk pool to pay the benefits to which the employee is entitled, that the assigned carrier be permitted to submit all payments made on behalf of the injured employee to the Second Injury Fund for reimbursement and the Department of Labor be subrogated, on behalf of the State of Tennessee, to the right of the employee to recover Second Injury Fund monies from the uninsured employer. Mr. Pitts agreed this is an issue which needed to be addressed but was uncomfortable with adopting a procedure which would involve the assigned risk plan and the Second Injury Fund without further study. Therefore, the employer representatives voted not to support the motion at this time to allow study of the issue.

>SB531/HB751 -- This bill was amended to require the workers' compensation specialists be provided continuing education in the area of Tennessee workers' compensation law, to include at least six (6) hours of continuing education each fiscal year, three (3) of which must be approved by the Tennessee Commission on Continuing Legal Education and Specialization. In addition, the amended bill required each new employee to receive two days of formal training and education on the department's workers' compensation system, the workers' compensation statutes and case law and the department's rules and regulations. The Director is required to maintain documentation of the educational training provided to each employee. After discussion, the Advisory Council unanimously recommended passage of the proposed amendment.

The final piece of legislation considered by the Advisory Council was SB427/HB325. At the March 19 meeting, the Advisory Council had suggested changes to the bill to allow a suit to be filed in either the county in which the employee or employer, but not the employer's insurer, resided or in which the accident occurred and to delete provisions related to the judge or county chair. Ms. Hughes explained an amendment she had drafted which included substantive provisions of the original bill, the changes recommended by the Advisory Council at the March meeting and which also consolidated and revised the first four subsections of TCA 50-6-225 to make it consistent with the current case law on venue and consistent with the current trial and court practice in the courts specified. Ms. Hughes reported she had spoken with representatives of the Tennessee Defense Lawyers Association and the Tennessee Trial Attorneys concerning the proposed language and neither noted any problems with the proposed amendment. Following consideration of this proposed amendment, the Advisory Council unanimously recommended the sponsors of the bill consider this amendment drafted by staff to replace the present language of the bill.

C. REPORT OF EXECUTIVE DIRECTOR

Ms. Hughes reported that Ms. Jimmie K. Corder had resigned from the Advisory Council and has retired from Worldwide. Her resignation was effective March 19, 1999 and Speaker Naifeh appointed Mr. Steven Turner of Turner Dairies, Inc. to replace Ms. Corder. Mr. Pitts made a motion, seconded by Mr. Smith, that staff prepare a letter on behalf of the Advisory Council thanking Ms. Corder for her service and wishing her well. The motion passed unanimously. Ms. Hughes was requested to circulate the letter to the members for each to sign.

Ms. Hughes reported the Advisory Council's annual report was due on or before May 1, 1999, and inquired how the Advisory Council wished to review the report. Ms. Hughes was requested to forward a draft of the report to members for comments and to set a deadline for comments to be received. If no comments were received, she was directed to assume it was approved.

Ms. Hughes reported the Oversight Committee was scheduled to meet on April 12. It was decided to keep the Advisory Council's next scheduled meeting, April 23, on the calendar until it could be determined by the Executive Committee whether the meeting would be necessary as a result of actions of the Oversight Committee. Ms. Hughes was directed to notify members whether or not the meeting would be canceled.

The meeting was adjourned at 3:10 p.m.